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83-1428

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HECTOR THEODORE VALDES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 13, 1984

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND CREATES IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT BY HERALDING THE END OF THE TIME HONORED MERE PRESENCE RULE.

II. WHETHER THE DECISION BELOW CREATES IRRECONCILABLE CONFLICT WITH VARIOUS CIRCUIT COURT DECISIONS INCLUDING UNITED STATES v. LOPEZ-ORTIZ, 492 F.2d 109 (5th Cir. 1974); UNITED STATES v. REYES, 595 F.2d 275 (5th Cir. 1979); UNITED STATES v. PINTADO, 715 F.2d 1501 (11th Cir. 1983); UNITED STATES v. PARDO, 636 F.2d 535 (D.C. Cir. 1980); and UNITED STATES v. LAUGHMAN, 618 F.2d 1067 (4th Cir. 1980).

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America

Alberto Lopez-Llerena

Felix Parra

Jose Borges

Jose Delfin Mule Vasquez

Lazaro Cruz, Jr.

Hector Theodore Valdes

Fausto Manuel Sanchez

Raul Pinera

Carles Olivera-Chirino

Jose Luis Marino

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for the Eleventh Circuit

OPINION BELOW

The opinion of the lower court is reported in United States v. Lopez-Llerena, 721 F.2d 311 (11th Cir. 1983), rehearing denied, 721 F.2d 311 (11th Cir. 1983).

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit affirming the Petitioner's conviction was entered on August 30, 1983. On December 16, 1983, the Eleventh Circuit denied the Petitioner's Petition for Rehearing. On January 6, 1984, the Eleventh Circuit denied Petitioner's suggestion for Rehearing En Banc.*/

The jurisdiction of the Court is invoked pursuant to 28 U.S.C., § 1254(1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

U.S. Const., Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a

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*/ The judgment and opinion on rehearing are contained in the appendix to the brief of Petitioner Alberto Lopez-Llerena, a codefendant, which Petitioner VALDES adopts here. VALDES supplements that appendix with the order denying rehearing en banc.

speedy and public trial, by an impartial jury . . . and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

21 U.S.C. § 846, attempt and conspiracy:

Any person who attempts or conspires to commit any offense devined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

The Petitioner HECTOR THEODORE VALDES was arrested as a result of a law enforcement raid on two neighboring houses in a residential area in Key Largo, Florida, following an off-load of marijuana from two vessels docked behind the premises. He, along with ten codefendants, was charged in a two-count Indictment with conspiracy to possess with intent to distribute marijuana and with possession of marijuana. After an initial trial, resulting in a hung jury, each of the defendants was ultimately found guilty of conspiracy and not guilty of the possession count.

The evidence showed that when various police vehicles with flashing blue lights and sirens sounding converged on the premises, various suspects ran in different directions. At least three people climbed an external stairway and went into the upstairs portion of one of the two neighboring houses raided. Four persons were observed running toward a

cluster of sea grape bushes. Three persons were arrested after being observed running towards a fence near a canal. A final person was found hiding under a dock. None of the eleven persons ultimately arrested was ever identified as having participated in any way in the off-load operation. Petitioner was found in the cluster of sea grape bushes.

There were no fingerprints, no photographs, no evidence of recent exertion, no marijuana residue, no statements, no contraband on any of the persons arrested.

There was, however, substantial evidence to show that other people at the scene had avoided detection and apprehension. Nevertheless, the Petitioner was arrested, charged and convicted because of his proximity to the off-load operation. By the agents' own admission, they would have, and did, arrest everyone they found. Because eleven people had been observed participating in the off-load and eleven people were ultimately arrested, each of those arrested was tried and convicted

based entirely on his presence in the area, despite the conceded inability of the arresting officers to have apprehended all those who participated. Such a result does not comport with either the promise of a fair trial or the guarantee of due process afforded by the Fifth Amendment to the United States Constitution.

The Eleventh Circuit's jurisdiction to entertain Petitioner's direct appeal was predicated upon 28 U.S.C., Section 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND CREATES IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT BY HERALDING THE END OF THE TIME HONORED MERE PRESENCE RULE.

The decision of the Eleventh Circuit Court of Appeals affirming the Petitioner's conviction for conspiracy to possess marijuana signals the death knell of the heretofore established "mere presence doctrine" in this jurisdiction. It has long been the rule, as

held by this Court in United States v. DiRe, 332 U.S. 581, 593 (1948), that mere presence is insufficient, without more, to sustain a conviction for conspiracy. Likewise, equally well established is the doctrine repeatedly expressed as in Sibron v. New York, 392 U.S. 40, 62-63 (1968), and Ybarra v. Illinois, 444 U.S. 85, 91 (1980), that:

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.

The decision of the Eleventh Circuit in this case signifies an extraordinary and irreconcilable departure from the time honored rule that mere presence, even when coupled with flight, is not alone enough upon which to predicate criminal convictions.

In the case at bar, two vessels, the "Sunshine" and the "Odette", were observed by police being unloaded of their cargoes of marijuana during the early morning hours of December 22, 1981. The "Sunshine" arrived first, docked behind a house in Key Largo,

Florida, and approximately an hour later, after the "Sunshine" had departed, the "Odette" docked behind a house next door. (Tr. 82-84, 88). It appeared to surveilling officers that eleven people, all together, were involved in each off-load operation. None of the defendants at trial were identified by any government witness as having been involved in either off-load operation. None of the government's witnesses could identify any defendant as having been observed at any specific location on the 21st or 22nd of December, 1981, prior to his arrest. (Tr. 418-419). No surveilling officer was able to see the faces of any of the people at the scene. They could not describe what any of the people were wearing. The individuals involved could only be seen as silhouettes. (Tr. 84-85). It was not known whether the people seen were black or white. (Tr. 217, 454).

There was no attempt to obtain fingerprints in this case. (Tr. 124-126).

Although the "Sunshine" was later seized in the Miami River, no evidence was presented that it was tested for latent fingerprint impressions so as to identify the people who had been on board it. (Tr. 156-157). No evidence was presented that any of the suspects had marijuana residue on their clothing. Apparently, no attempt was made to gather such evidence. (Tr. 218-222). Radio broadcasts and communications related to the investigation were monitored, however, none were admitted into evidence or described by any witness. (Tr. 150). No conversations or interceptions were recorded. (Tr. 150).

No attempt was made to take photographs of the off-loading operation. (Tr. 151, 242). No evidence was presented that any of the defendants on trial owned either of the houses or vessels involved in this case. (Tr. 193-194). Later investigation revealed that one of the houses was owned or rented by an individual uncharged in this case. (Tr. 152). Papers located on the vessel "Odette"

indicated that its owner was also a person who was not arrested. (Tr. 147).

The critical deficiency in the government's case against the Petitioner involves the fact that the prosecution was based solely upon a "numbers game." All that was certain was that anyone on the premises or in the immediate area would be arrested even though the actual arresting officer had no knowledge of how many people were involved in the off-loading operation. (Tr. 301-302). However, since eleven people were observed in the off-loading operation, it was predistined that eleven people would be arrested and face trial in this case.

The defect in the government's theory of the case, however, involved not only the insufficiency of the evidence against the Petitioner, but the fact that there was evidence that guilty persons involved in the off-load operation had escaped detection while innocents were indiscriminately arrested and charged. The undisputed evidence presented by

the government demonstrated that Drug Enforcement Administration Agent William Simpkins took possession of two wallets discovered in the first house. (Tr. 668-669). The two people identified by documentation found within the wallets were not arrested. (Tr. 669-671). The wallets contained various checks, bank deposit slips, documents, and approximately eight hundred to one thousand dollars in cash. (Tr. 686).

In addition, the government's own evidence established that one man observed during surveillance carried a machine gun type weapon described as an Uzi machine gun. (Tr. 90, 371-372). None of the eleven defendants arrested in this case possessed a weapon. Despite an extensive search, no weapons were found in either house, the surrounding canals or grounds. (Tr. 306, 322).

In addition to the missing weapon, the two people who abandoned their wallets, money, and personal possessions at the scene, and whatever unknown, unobservable people remained

within the premises and in the proximity of the vessels, there existed the express admission by the government witnesses that more than eleven people arrested may have been involved. Prior to the raid, the roadway coming into the area was not closed. (Tr. 207). Accordingly, after eleven people were apprehended, a search was nevertheless conducted of the area because it was unknown whether or not more people were in front of the house. (Tr. 209-210). One surveilling officer expressly admitted he could not testify whether or not any of the suspects had escaped from the area and avoided apprehension. (Tr. 423).

Thus, the decision of the Eleventh Circuit invites, if not compels, devotion to the idea that one's suspicious mere presence at the scene of a crime sustains proof beyond a reasonable doubt of his guilt. In addition, the departure of this case from established United States Supreme Court doctrine is aggravated by the court's misplaced reliance

upon the Eleventh Circuit's own prior decision in United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983), cert. denied, ___U.S.___.

However, as set forth in the factual recitation in Blasco at 1320-1321:

> The Cohen estate is bordered by water on two sides--the southern end of the residence rests upon a canal, and the western portion of the property extends to the Spanish Harbor Channel. The remaining two sides are enclosed by a chain-link fence, and, on the night in question, the gate across the road leading to the residence was padlocked.

Moreover, the Blasco court revealed that "the officers moved. . .to. . .a point from which they could see the entrance to the canal leading to the Cohen property." Id. at 1321. Also, the officers involved in the Blasco raid were "instructed to shut off the possible avenues of escape." Id. Finally, regarding the nature of the area involved in Blasco, the court expressly noted: "The Cohen estate is situated in a secluded area, the kind frequently utilized for off-load operations." Id. at 1332.

In the case at bar, the undisputed testimony of the arresting officers was that they could not preclude the possibility that someone escaped from the residences involved prior to the time the officers reached the scene from the surveillance point across the canal. (Tr. 423). No officers were positioned to prevent suspects from escaping via the canals which ran along both sides of the area in question. (Tr. 480). The photographic evidence introduced at trial clearly revealed that the area in which the residences were located was not private and secluded, as in Blasco, but rather contained dozens of nearby homes into which any number of suspects could have entered and hidden. In addition, the record detects numerous escape routes along hundreds of yards of seawall giving access to both canals.

If the mere presence doctrine is to enjoy further viability and if this Court's precedent is to be honored, certiorari must be granted to remedy the constitutional aberra-

tion created by the Eleventh Circuit Court of Appeals in this case.

II.

THE DECISION BELOW CREATES IRRECONCILABLE CONFLICT WITH VARIOUS CIRCUIT COURT DECISIONS INCLUDING UNITED STATES v. LOPEZ-ORTIZ, 492 F.2d 109 (5th Cir. 1974); UNITED STATES v. REYES, 595 F.2d 275 (5th Cir. 1979); UNITED STATES v. PINTADO, 715 F.2d 1501 (11th Cir. 1983); UNITED STATES v. PARDO, 636 F.2d 535 (D.C. Cir. 1980); AND UNITED STATES v. LAUGHMAN, 618 F.2d 1067 (4th Cir. 1980).

The decision of the Fifth Circuit Court of Appeals in United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir.), cert. denied, 419 U.S. 1052 (1974), is materially indistinguishable from the case at bar. There, a nighttime surveillance revealed numerous people unloading large gunny sacks from a truck to the garage of a residence. A raid was conducted on the premises and the participants in the unloading operation "broke and ran." Two people were taken into custody in the immediate vicinity and Lopez-Ortiz was found hiding behind a rock wall dividing the premises from the next door

property. Despite the fact that numerous gunny sacks were in plain view and the odor of marijuana was prevalent, the court reversed the defendant's conviction for conspiracy to possess marijuana with intent to distribute it since his presence and flight did not prove the offense charged. Moreover, the court's decision was not altered by its finding that the defendant's story was impeached in at least three ways and its conclusion that these inconsistencies resulted in a jury verdict of guilty. The court, noting that the issue before it was not the credibility of the defendant's story, held:

> At best, the evidence establishes only that he was present in the area and had fled from federal officers. It does not show that he actually participated in the unloading operation, or began his flight from near the truck. Further, there was no testimony by the government agents that Lopez-Ortiz had approached and entered the house prior to the raid. Indeed, all the arresting officers could say was that they found him behind a nearby rock wall. 492 F.2d at 115.

The identical conclusion should have been

reached by the Eleventh Circuit Court of Appeals in this case.

That court's decision is equally irreconcilable with the decision of the court in United States v. Reyes, 595 F.2d 275 (5th Cir. 1979). In Reyes, the defendants were found in a small airplane from which bales of marijuana had been dropped. There was no evidence that they pushed the bales out. Their convictions were reversed since

> there was no direct testimony that any of them did so, much less that all of them participated. Each of the defendants was entitled to have his guilt or innocence determined as an individual; the government failed to prove beyond a reasonable doubt that each defendant or any particular defendant participated. . .. 595 F.2d at 281 (emphasis by court).

The contrary result reached by the Eleventh Circuit in this case, and even its own internal conflict, is palably demonstrated by its subsequent decision in United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983). The case at bar and Pintado are remarkable for

their factual similarities. Both involved Customs surveillances of houses bordering canals in the Florida Keys. Both involved marijuana off-load operations from a vessel docked behind the premises involving numerous, unidentified people. In each case, a raid by numerous Customs officials resulted in the arrests of all the suspects they were able to find at the scene.

In Pintado, after two suspects were arrested outside, others ran into the house and were followed by Customs agents:

> Two agents climbed the stairs to the second floor of the house and were confronted with a pair of locked doors. An official knocked on one of the doors, announced in English "U.S. Customs" and asked whoever was in the room to come out. When no response was received, the door was forced open. Appellant, wearing a pair of pants and perhaps a shirt, was found hiding in the closet. 715 F.2d at 1503. (Footnote omitted.)

The Pintado court, relying upon the Fifth Circuit's United States v. Lopez-Ortiz, supra, correctly applied the law that "neither mere

presence at the scene in conjunction with fleeing or hiding from officers of the law alone will support a conspiracy conviction." 715 F.2d at 1504. The court thus held:

> The government provided no evidentiary basis other than [Pintado's] presence in the house, hiding in the closet, from which an inference of conspiratorial participation could be drawn. [Emphasis added.]

Despite the graphic similarities in the two cases, the Pintado court reversed the conspiracy conviction while the Lopez-Llerena court in the case at bar affirmed.[1]

The distinctions that do exist between Pintado and Lopez-Llerena are noteworthy because they demonstrate even more compellingly that the conviction in the case at bar cannot be sustained. In Pintado, security lights in the rear of the house were lighted and dock lights along the canal were illumi-

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[1] The court's decision in the case at bar engages in obvious hair-splitting in its attempts to reconcile the contrary result reached in Pintado. See 721 F.2d at 313-314, & notes 3 and 6.

nated. In the case at bar, the off-load operation was conducted in the blackness of night--so dark, in fact, that even with a night scope all that could be seen by the surveilling officers was silhouettes. (Tr. 169-170, 199). Thus, the conclusion reached by the Pintado court that there were "no objective facts or circumstances from which Appellant's knowledge of the on-going operation could be inferred" is all the more compelled here.

Finally, the Eleventh Circuit's abrogation of the mere presence rule is at odds with the decisions in United States v. Pardo, 636 F.2d 535 (D.C. Cir. 1980), and United States v. Laughman, 618 F.2d 1067 (4th Cir. 1980). As stated by the Laughman court at 1075:

> Simply proving the existence of a conspiracy, however, cannot sustain a verdict against an individual defendant. There must also be a showing of that defendant's knowledge of the conspiracy's purpose and some action indicating his participation. United States v. Falcone, 311 U.S. 205, 210-211, 61 S.Ct. 204,

206-207, 85 L.Ed. 128 (1940). . . .
(Emphasis added.)

The opposite conclusion reached by two panels of the Eleventh Circuit within the period of a month on the same issue and, for all intents and purposes, the same facts, is utterly irreconcilable.[2] Certiorari must be granted to resolve the conflict created by the Eleventh Circuit Court of Appeals as well as to remedy the injustice suffered by JOSE LUIS MARINO.

CONCLUSION

The case below characterizes a radical departure from the substantive body of case law developed by this Court as well as the other Circuit Courts of Appeals regarding mere presence at the scene of a crime. The matter

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[2] The unsettled state of the law does not appear to be unappreciated by the juries that tried either Pintado or the Petitioner here. Both juries failed to convict the defendants on Count II of their Indictments charging possesion of marijuana with intent to distribute while each, apparently compromising, rendered guilty verdicts solely on the conspiracy count.

involved in this case is of extreme judicial significance. The maintenance of uniformity in the administration of criminal justice in the federal courts is jeopardized by the decision below. For the reasons and authority advanced above, therefore, the Petitioner strenuously urges this Court to grant its Writ of Certiorari in this case.

Respectfully submitted,

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By: _____
MARC COOPER

February 13, 1984

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5916

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ALBERTO LOPEZ-LLERENA,
FELIX PARRA,
JOSE BORGES,
JOSE DELFIN MULE VASQUEZ,
LAZARO CRUZ, JR.,
HECTOR THEODORE VALDES,
FAUSTO MANUEL SANCHEZ,
RAUL PINERA,
CARLOS OLIVER-CHIRINO and
JOSE LUIS MARINO,

Defendants-Appellants.

- - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Florida

- - - - - - - - - - - - - - - -

ON PETITIONS FOR REHEARING
AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion August 30, 11 Cir., 1983,
___ F.2d ___).

(JAN 6 1984)

Before FAY and KRAVITCH, Circuit Judges, and ATKINS*/ District Judge..

PER CURIAM:

(/) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service

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*/ Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida sitting by designation.

having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

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